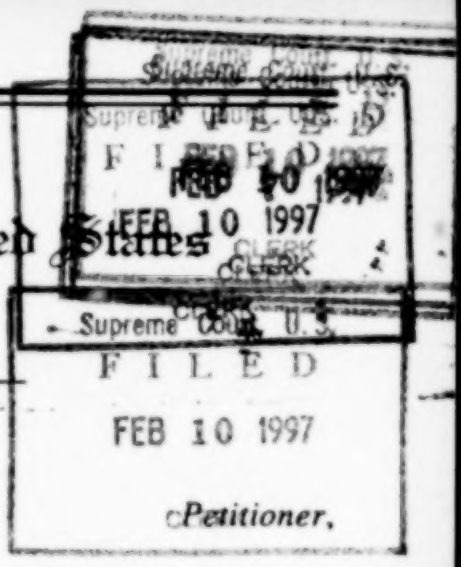
No. 96-5955



IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STEINEY J. RICHARDS,

Petitioner,

—v.—

STATE OF WISCONSIN,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF WISCONSIN

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION , THE ACLU OF WISCONSIN, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONER

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INTEREST OF AMICI [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Wisconsin is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many cases involving the Fourth Amendment. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the proper and fair administration of criminal justice. It has a membership of more that 9,000 attorneys and 28,000 affiliate members in 50 states. NACDL is recognized by the American Bar Association as an affiliate organization, and has full representation in the ABA's House of Delegates. NACDL strives to defend the liberties guaranteed by the Bill of Rights.

STATEMENT OF THE CASE

At 3:40 a.m. on December 31, 1991, Madison, Wisconsin police officers forcibly entered petitioner's motel room to execute a search warrant to look for illegal narcotics. Prior to the search, the magistrate who issued the warrant

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

had determined that the facts of the case were "insufficient to justify a no-knock warrant and therefore had rejected the request for a no-knock warrant." 549 N.W.2d 218, 228 n.3 (1996). Despite this judicial determination, the police did not announce their presence and purpose before entry. A search of the room revealed illegal narcotics. No guns or evidence of gun possession was discovered.

After the trial court denied the petitioner's suppression motion, he pleaded guilty to the felony of possession of cocaine base with the intent to deliver and was sentenced to a prison term. The state appellate court upheld the conviction.

The Wisconsin Supreme Court found that the entry of petitioner's motel room did not violate the Fourth Amendment. According to the court, the sole issue was whether the Fourth Amendment "allows a blanket exception to the general requirement of 'knock and announce' for entries into premises pursuant to a search warrant for felonious drug delivery." 549 N.W.2d at 220. Reaffirming its earlier decision, *State v. Stevens,* 511 N.W.2d 591 (1994), *cert. denied*, __ U.S. __, 115 S.Ct. 2245 (1995), the Wisconsin high court ruled the police could always ignore the announcement rule in felony drug cases, notwithstanding *Wilson v. Arkansas*, 514 U.S. __, 115 S.Ct. 1914, 1916 (1995), which held that notice was an essential part of the reasonableness inquiry required by the Fourth Amendment. The court ruled "that exigent circumstances are always present in the execution of search warrants involving felonious drug delivery." 549 N.W.2d at 227.

Petitioner argues here that the exception created below, which grants officers unreviewable discretion to ignore the notice requirement, is inconsistent with Fourth Amendment norms established by this Court.

SUMMARY OF ARGUMENT

The common law did not provide blanket exceptions to the announcement requirement. State statutes and legal manuals of the framers' era adopted the notice rule without exception. Even peace officers executing warrants for easily disposable forms of contraband were required to obey the notice requirement. Exceptions to the notice requirement subsequently emerged on a case-by-case basis.

Consistent with history, this Court's modern cases applying the notice rule do not support a blanket exception that eliminates judicial review of all forcible entries into a private home to execute a search warrant for narcotics. *Wilson v. Arkansas* held that the announcement rule is part of the reasonableness inquiry under the Fourth Amendment. The holding in *Wilson*, combined with the result in *Ker v. California*, 374 U.S. 23 (1963), demonstrates that a reasonableness inquiry envisions a judicial assessment in each case of the underlying facts and applicable legal principles to determine whether a challenged entry was reasonable.

The exception adopted below ignores that principle by giving officers unreviewable discretion to decide how a Fourth Amendment safeguard will be enforced in the home. This result conflicts with many decisions of the Court rejecting police procedures that confer unlimited power to officers while intruding into a home. It matters little whether the ruling below is deemed a "narrow exception" to the notice requirement or a "bright-line" rule. The critical point is that the judgment below leaves enforcement of the announcement rule to the discretion of police officers, and eliminates judicial scrutiny whenever a search warrant for felonious drug delivery is executed. This judgement contradicts the norm that all entries into the home, even entries authorized by a judicial warrant or a recognized exception to the warrant requirement, must still pass constitutional muster under the Reasonableness Clause.

Exceptions to Fourth Amendment requirements are narrowly tailored by the urgency of the facts in a particular case. The burden is on the state to demonstrate a need for suspension of Fourth Amendment safeguards. Thus, an exception to the announcement rule due to exigent circumstances; whether they concern threats to police safety or the destruction of evidence, depends on a case-specific evaluation of the facts. Wisconsin's legitimate interest in allowing officers entering a private dwelling to take reasonable steps to neutralize a potential emergency can be accommodated within the reasonableness inquiry developed by this Court's precedents.

ARGUMENT

I. BLANKET EXCEPTIONS TO THE NOTICE RULE DID NOT EXIST UNDER THE COMMON LAW

This Court has often looked to common law principles when assessing the reasonableness of a police intrusion. In *Wilson*, a unanimous Court reaffirmed the fundamental nature of the right to notification before a forcible police entry. The same historical materials that informed the Court's judgment in *Wilson* teach that the framers of the Fourth Amendment would not have sanctioned the blanket exception to the notice rule that was created below.

Despite the fact that eighteenth century peace officers executing warrants often confronted situations that presented the potential for the destruction of evidence or for armed resistance, the common law did not provide blanket exceptions to the announcement rule.[2] Early American courts

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[2] *See Ker v. California*, 374 U.S. at 54 (opinion of Brennan, J.)("I have found no English decision which clearly recognizes any exception to the (continued...)

embraced the announcement rule for the execution of arrest and search warrants.[3] "In most states, custom, practice, or legislation required officers to request admittance into a house and break in only if they had to."[4] After the ratification of the Fourth Amendment, exceptions to the announce-

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[2] (...continued)
requirement that the police first give notice of their authority and purpose before forcibly entering a home"); Note, "Announcements in Police Entries," 80 Yale L.J. 139, 144 (1970)("Efforts to legislate a no-knock authorization were repeatedly resisted in the eighteenth century [in England], despite the fact that such powers were proposed as a means of increasing police effectiveness. American colonial experience with announcement prior to entrance was parallel to England's: execution of all warrants was made with notice. There are no reported cases in America before 1791 discussing exceptions to announcement")(footnotes omitted); Jennifer M. Goddard, Note, "The Destruction of Evidence Exception to the Knock and Announce Rule: A Call for Protection of Fourth Amendment Rights," 75 B.U.L.Rev. 449, 460 (1995)("Courts recognized exceptions [to announcement] only in those instances when the person within the home knew of the presence and purpose of the police")(footnotes omitted); Robert J. Driscoll, "Unannounced Police Entries and Destruction of Evidence After *Wilson v. Arkansas*," 29 Colum. J.L. & Soc. Probs. 1, 26 (1995)("Reported decisions from the period surrounding the ratification of the Bill of Rights do not reflect judicial acceptance of a destruction-of-evidence exception to the general rule of announcement . . . . [T]he status of the exception as a relative newcomer to knock-and-announce jurisprudence justifies a cautious approach when considering arguments that the exception should be construed broadly or that such an interpretation is consonant with the intentions of the Framers").

[3] *See, e.g., State v. Shaw*, 1 Root 134 (Conn. 1789)(arrest warrant for treason); *Kelsy v. Wright*, 1 Root 83 (Conn. 1783)(arrest warrant for lewd conduct).

[4] William Cuddihy, "The Fourth Amendment: Origins and Original Meaning, 602-1791" at 1511 (1990)(unpublished Ph.D. dissertation, Claremont Graduate School). *See, e.g., Bell v. Clapp*, 10 Johns. R. 263 (N.Y.Sup.Ct. 1813)(affirming right of officer who, after proper notice, conducted forcible entry to execute search warrant).

ment rule were developed on a case-by-case basis.[5]

Opportunities to adopt a blanket exception to the notice rule were available, but were not acted upon by the states during the framers' era. Despite a preoccupation with the illicit trade in alcohol and its easily disposable nature, eighteenth century peace officers were required to follow the announcement rule. "The statutes and legal manuals of at least seven states permitted forcible entry only after a householder had refused to admit a searcher under circumstances that included smuggling, counterfeiting, and trading with the enemy."[6] For example, a 1776 Massachusetts law governing the issuance of search warrants to discover forged bills, which could be easily destroyed in the hearth, allowed an officer to enter a home "*after* demanding of the Owner of such house . . . admittance, and if the owner of the same, or the person in his absence found therein shall not open the same immediately."[7] Similarly, a 1782 Massachusetts law on search warrants for contraband, including British rum, permitted forcible entry "if Admittance be *refused* or cannot be obtained."[8] In the early 1780's, New York, New Jersey and Pennsylvania passed laws that authorized constables to break open the doors of private homes in search of contraband alcohol, but only after the householder had refused a

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[5] *See* Goddard, *supra* n.2, at 460-64; Driscoll, *supra* n.2, at 26. *Cf.* G. Robert Blakey, "The Rule of Announcement and Unlawful Entry: *Miller v. United States* and *Ker v. California*," 112 U.Pa.L.Rev. 499, 505 (1964)(listing nineteenth century cases recognizing exceptions to common law notice rule).

[6] Cuddihy, *supra* n.4, at 1512 (footnotes listing state laws omitted).

[7] Mass. Resolve 1776-77, ch.1176, at 936 (emphasis added).

[8] Mass. Acts And Laws, 1782-83, ch.32, at 86-87 (emphasis added).

prior demand of admittance.[9]

Early federal laws also refused to adopt blanket exceptions to the notice rule. While the Collection Act of 1789 was neutral on unannounced entries, the Judiciary Act of 1789 "effectively renounced those entries by requiring [] officers to accomplish seizures and arrests through the usual legal processes of their resident states."[10] On March 3, 1791, Congress enacted a provision concerning distilled spirits that permitted inspection of homes and businesses, but officers were required to request admittance before entry.[11]

In 1917, Congress codified the common law notice rule for the execution of search warrants by federal agents.[12] Significantly, this law did not contain a blanket exception, despite congressional knowledge that warrants would be issued "in cases involving weapons . . . [and] destructible evidence such as opium and liquor."[13] Congress later extended the announcement requirement to the National Prohibition Act.[14] "In making this extension, Congress notably did not draft an exception for searches of easily destroyed evidence such as liquor."[15] The only exception

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[9] N.Y.St. sess.5, ch.39, §3 (April 13, 1782), N.Y. State Laws, vol.1 (1777-84), p.480; N.J.St., 6th Gen. Assemb., 2d Sitting, ch.XXXII, §18 (June 24, 1782); Pa.Stats. ch. CXC, §10 (1780).

[10] Cuddihy, *supra* n.4, at 1513 (footnote omitted).

[11] U.S. Stat., 1st Cong., Sess. III, ch.15, §29 (March 3, 1791).

[12] 18 U.S.C. §3109 (originally enacted as the Espionage Act, ch.30, tit.XI, §8,40 Stat.217, 228-29).

[13] Charles Patrick Garcia, Note, "The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception," 93 Colum.L. Rev. 685, 690 (1993).

[14] Ch.85, tit.I, §25, 41 Stat. 305, 315 (1919)(repealed 1933).

[15] Goddard, *supra* n.2, at 457.

referenced by Congress was the peril exception,[16] which applied on a case-by-case basis, though it was common knowledge that the organized criminals who trafficked in illegal liquor during the Prohibition era were often heavily armed.

The lack of historical evidence supporting a blanket exception to the notice rule is not surprising. Blanket intrusions were particularly pernicious to the framers because officers were given unfettered discretion to search and seize without judicial review.[17] It was considered dangerous to allow "any private man, or even any public tribunal" to consider the violation of private property justified by the common good "and to decide whether [certain practices] be expedient or no." 1 W. Blackstone, COMMENTARIES *139. A blanket exception is inimical to Fourth Amendment values for another reason: it gives officers discretion to treat unlike cases alike. Like the writs of assistance which granted British customs officers the unreviewable discretion "to search at their will,"[18] the blanket exception created below empowers officers to ignore the notice rule regardless of the

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[16] *See* 18 U.S.C. §3109 ("The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant").

[17] *Cf. Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. __, 115 S.Ct. 2386, 2398 (1995)(O'Connor, J., dissenting)(acknowledging the view "that blanket searches are 'intolerable and unreasonable' is well-grounded in history").

[18] Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 54 (John Hopkins Press 1937).

facts.[19] Accordingly, the historical record provides no support for the blanket exception created below, nor would the framers have sanctioned such a result.[20]

II. THE COURT'S CASES APPLYING THE ANNOUNCEMENT RULE DO NOT SANCTION A REGIME THAT GIVES OFFICERS UNREVIEWABLE DISCRETION TO FORCIBLY ENTER A HOME WITHOUT NOTICE

The above argument illustrates that a blanket exception to the knock and announce requirement contradicts common law principles and the original meaning of the Fourth Amendment. But the blanket exception sanctioned below does more than offend common law precepts. It also disregards this Court's current Fourth Amendment precedents. No ruling of this Court supports the judgment that officers have unreviewable discretion to disregard a safeguard guaranteed by the Reasonableness Clause.

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[19] Ironically, "the legislation creating the writs required that notice be given before entry was made, and reported instances of its use included notice . . . . It is fair to assume that the framers did not consider any arrest or search to be reasonable that did not include the level of announcement present even in the hated writs of assistance." Note, *supra* n.2, at 145 (footnotes omitted).

[20] *See, e.g. Ratcliffe v. Burton*, 3 Bos. & Pul. 223, 230, 127 Eng. Rep. 123, 127 (1802)(Rooke, J.)("What a privilege will be allowed to sheriffs' officers if they are permitted to effect their search by violence, without making that demand which possibly will be complied with, and consequently violence be rendered unnecessary!").

A. The Holding In *Wilson* Does Not Support A Blanket Exception To The Notice Rule, Nor Leave Enforcement Of That Rule To The Discretion Of Police Officers

Relying on its ancient roots in the common law and the legal norms that were understood and established during the framers' era, *Wilson* held that the knock and announce rule forms part of the "reasonableness inquiry under the Fourth Amendment." 115 S.Ct. at 1918. While the historical pedigree of the announcement rule left "little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure," *id.* at 1918, *Wilson* was equally clear that it was not establishing an absolute rule.

Wilson reached this Court after the Arkansas Supreme Court ruled that "[t]here is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment." 878 S.W.2d 755, 758 (1994). Rejecting this "all-or-nothing" view of the Reasonableness Clause, *Wilson* interpreted the Amendment to embody a "presumption in favor of announcement" that might sometimes yield to important state interests. 115 S.Ct. at 1918-19. *Wilson* was a careful, judicious endeavor to balance the individual's interest in privacy and physical safety protected by the announcement rule without unduly burdening the legitimate needs of law enforcement.[21]

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[21] *See* 115 S.Ct. at 1918 ("The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests"); *id.* at 1919 ("We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior (continued...)

Inattentive to the measured reasoning of *Wilson*, the court below not only announced a categorical rule that eliminates judicial review of unannounced entries where narcotics are involved, it also rejected the argument that the Reasonableness Clause controls such entries.[22] This judgment misconstrues the rationale of *Wilson*.

After acknowledging that "'the underlying command of the Fourth Amendment is always that searches and seizures be reasonable,'" *Wilson*, 115 S.Ct. at 1916, quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), the *Wilson* Court held that the announcement rule "is an element of the reasonableness inquiry under the Fourth Amendment." *Wilson*, 115 S.Ct. at 1918. The Court also recognized that a "reasonableness inquiry" would accommodate exceptions to the notice rule, depending on the specific facts of the case.[23] This holding does not, however, recommend the creation of a blanket rule.[24] Rather, *Wilson* contemplated

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[21] (...continued)
announcement, law enforcement interests may also establish the reasonableness of an unannounced entry").

[22] *See* 549 N.W.2d at 222 ("Richards further contends that *Wilson* requires a reasonableness analysis be performed for every unannounced search and seizure. We disagree").

[23] *Id.* at 1918-19 (noting cases where the "presumption in favor of announcement would yield under circumstances presenting a threat of physical violence"; "a prisoner escapes from [custody] and retreats to his dwelling"; and "officers have reason to believe that evidence would likely be destroyed")(citations omitted).

[24] The reasonableness analysis in *Wilson* is consistent with the Court's recent Fourth Amendment rulings. For example, last Term in *Ohio v. Robinette*, 519 U.S. __, 117 S.Ct. 417 (1996), the Court rejected the Ohio Supreme Court's imposition of a bright-line rule for determining whether a motorist's detention continued after an officer requested consent to search the vehicle after completing a traffic stop. This Court re-
(continued...)

that this "reasonableness inquiry" would entail a state court's assessment of the underlying facts and analysis of legal principles. *Wilson*'s holding, which eschewed rigid, inflexible rules, is an incongruous precedent for a blanket, inflexible rule that renounces judicial review and permits officers to ignore the constraints of the Reasonableness Clause when executing a search warrant for drugs in a private home.[25]

The court below concedes, as it must, that Wisconsin officers will make choices when executing an entry into private premises.[26] But instead of recognizing that the choices made by officers are reviewable under the standards of reasonableness mandated by the Fourth Amendment, the court insulates those choices from all judicial scrutiny. That view cannot be reconciled with either the Reasonableness Clause or this Court's decisions.

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[24] (...continued)
iterated that the issue of seizure depends on a reasonableness analysis that considers the totality of the circumstances.

[25] Significantly, *Wilson* declined Arkansas' invitation to decide whether there were sufficient factual exigencies in the case that justified the denial of notice. Because the Arkansas Supreme Court had not addressed those points, *Wilson* remanded the case "to allow the state courts to make any necessary *findings of fact* and to make the determination of reasonableness in the first instance." 115 S.Ct. at 1919 (emphasis added). The Court's remand order obviously requires an evaluation of the specific facts in the case and a judicial determination of reasonableness. A rigid assumption about all police entries, which is the response of the court below, does not satisfy *Wilson*'s demands.

[26] *See* 549 N.W.2d at 225 ("In some cases, police officers will undoubtedly decide that their safety, the safety of others, and the effective execution of the warrant dictate that they knock and announce; in other cases, they might decide that such a procedure would be counterproductive or even dangerous").

B. Eight Justices In *Ker v. California* Agreed That The Reasonableness Of An Unannounced Entry Justified By Exigent Conditions Should Be Assessed By The Judiciary On The Facts And Circumstances Of Each Case

While *Wilson* confirmed that the notice rule is protected by the Reasonableness Clause, it did not clarify the scope of potential exceptions to the rule. However, the plurality and dissenting opinions in *Ker v. California*, 374 U.S. 23, analyzed how the facts in a particular case may affect enforcement of the rule. Both opinions confirm that a blanket exception for unannounced entries is incompatible with the reasonableness inquiry applied by this Court.

First, a nearly unanimous Court in *Ker* explained that the judicial inquiry required under the Reasonableness Clause is best implemented through a case-by-case method. Thus, eight Justices agreed with the statement that:

> . . . standards of reasonableness under the Fourth Amendment are not suspectible of Procrustean application . . . . [T]he reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment.

Id. at 33.

Reading *Ker* to authorize a blanket exception that eliminates judicial review and leaves enforcement of the notice rule to police discretion turns its reasoning upside-down. Eight Justices in *Ker* also agreed with the conclusion that state court findings on Fourth Amendment questions were

subject to independent review:

> [This Court will] . . . where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental -- i.e., constitutional -- criteria established by this Court have been respected.

Id. at 34.[27] Because *Ker* held that it was crucial for this Court to independently review the judgment of state courts regarding the reasonableness of an unannounced entry, *a fortiori*, state courts must undertake their own judgment of the reasonableness of an unannounced entry on a case-by-case basis; they cannot shift their constitutional functions to the discretion of officers.

Concerning the merits of the unannounced entry in *Ker*, Justice Clark's plurality opinion did not hold that such an entry is lawful *whenever* officers have grounds for a warrantless entry into a home involving narcotics. Rather, after considering the totality of the facts, he found that the unannounced entry was valid due to the exigent circumstances of the case.[28] While a minority has read *Ker* to endorse a blanket rule, Professor LaFave correctly notes that:

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[27] *Accord Ornelas v. United States*, 517 U.S. __, 116 S.Ct. 1657 (1996) (trial court's determination on the question of reasonable suspicion or probable cause should be reviewed by an appellate court under a *de novo* standard).

[28] 374 U.S. at 40 ("Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police")(footnote omitted).

> A close reading of *Ker* makes it clear that the plurality and dissenting opinions are not in disagreement as to whether a blanket . . . rule is called for, but only as to the sufficiency of the showing of particulars in that case. In approving the failure to give notice, the plurality opinion stressed that *in addition* to the fact that the narcotics "could be easily destroyed" there also existed "ground for the belief that [Ker] might well have been expecting the police" because of his earlier furtive conduct.[29]

Nor does the rationale of Justice Brennan's *Ker* opinion support the blanket exception created below. Relying on common law cases, he concluded that an unannounced entry was barred unless "circumstances exist in the *particular* case which allow an unannounced entry."[30]

In sum, eight members of the Court in *Ker* analyzed the specific facts of that case to determine the validity of the unannounced entry. In contrast, the judgment below upheld the unannounced, forcible entry of petitioner's hotel room with no consideration of the specific facts as required by *Ker*.

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[29] 2 Wayne F. LaFave, SEARCH AND SEIZURE §4.8(a) at 612 (3d ed. 1996). LaFave's reading of *Ker* is supported by Justice Clark's statement that the Court was "hold[ing] that in the *particular circumstances of this case* the officers' method of entry . . . was not unreasonable under the standards of the Fourth Amendment." *Ker*, 374 U.S. at 40-41 (emphasis added).

[30] 374 U.S. at 63 (footnote omitted). Justice Brennan read the common law cases to proscribe unannounced entries except where those within are aware of the officers' presence and purpose, or where there is imminent peril to persons, or where those within, made aware of the officers' presence, are destroying evidence or attempting to escape. *Id.* at 47.

III. WHETHER THEY ARE CALLED "NARROW EXCEPTIONS" OR "BRIGHT-LINE" RULES, PROCEDURES THAT GRANT OFFICERS THE POWER TO DECIDE HOW FOURTH AMENDMENT SAFEGUARDS WILL BE ENFORCED IN THE HOME HAVE BEEN CONSISTENTLY REJECTED BY THIS COURT

Because of the historic and constitutional respect accorded the home, this Court has consistently rebuffed police intrusions that expose the privacy of the home "to the discretion of the official in the field." *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967). Although the court below states that it is not creating a blanket rule, but only "a narrow exception to the general rule [of notice]," 549 N.W.2d at 222, the label attached to this discretionary power is constitutionally irrelevant. The critical point is that the judgment below leaves enforcement of the notice rule to the discretion of officers, and eliminates judicial scrutiny of unannounced entries whenever a search warrant for felonious drug delivery is challenged. Apart from its misreading of *Wilson* and *Ker*, this ruling cannot be reconciled with this Court's other precedents that constrain discretionary police power in the home.

Even in situations where officers hold a valid warrant or grounds exist justifying an exception to the warrant rule, this Court's decisions consistently reject attempts to piggyback discretionary powers onto a legitimate police intrusion. For example, *Maryland v. Buie*, 494 U.S. 325 (1990), dismissed a claim that officers who execute an arrest warrant in a home for a violent felon have *carte blanche* authority to undertake a protective sweep of that home. Aware of the potential dangers that confront officers anytime they venture onto a suspect's turf, *Buie* nonetheless held that a protective sweep is constitutional only upon "a reasonable belief based

on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 337.

The holding in *Mincey v. Arizona*, 437 U.S. 385 (1978), also is an obstacle to the "narrow exception" created below. Motivated by concerns similar to those that influenced the ruling below, the Arizona Supreme Court afforded police the discretion to search a home whenever a homicide occurs within because that crime invariably constitutes an emergency situation. Without questioning the state's interest in "making warrantless entries and searches when [officers] reasonably believe that a person within is in need of immediate aid," *id.* at 392-93, *Mincey* unanimously dismissed Arizona's categorical exception to the warrant requirement. Neither the "vital public interest in the prompt investigation of the extremely serious crime of murder," the existence of overwhelming evidence of Mincey's guilt, nor the fact that Mincey had already been lawfully arrested in his home, was sufficient to justify a discretionary police intrusion. *Id.* at 392-94. *See also Thompson v. Louisiana*, 469 U.S. 17 (1984)(*per curiam*).

The holding of *Chimel v. California*, 395 U.S. 752 (1969), similarly illustrates the Court's rejection of categorical rules that expand police discretion inside a home. There, officers had lawfully arrested Chimel inside his home. After completing the arrest, officers then, without a warrant, conducted an extensive search of the house.

In his dissent, Justice White saw nothing illegal in the search and urged adoption of what amounted to an automatic rule. According to Justice White, the search in *Chimel* was valid provided that "the existence of probable cause is independently established and would justify a warrant for a

broader search."[31] The *Chimel* majority, however, rejected the dissent's invitation to expand the discretion of arresting officers and concluded that the challenged search exceeded the permissible limits of a valid search incident to arrest. The Court explained that police intrusions of the home cannot be "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct." *Id.* at 764-65. The lawful arrest in Chimel's home did not justify a further invasion of his privacy and personal security even when that additional intrusion is considered "minor" in comparison to the lawful arrest.[32]

Despite the well-established constitutional command to

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[31] *Id.* at 780. Justice White defended this position based on, *inter alia*, his view that "the fact of arrest supplies an exigent circumstance justifying police action before the evidence can be removed." *Id.*

[32] *Buie*, *Mincey* and *Chimel* are by no means the only decisions of this Court that reject procedures that make law enforcement officers the final arbiters on how Fourth Amendment safeguards will be enforced in the home. The imperative of restraining police discretion was reaffirmed in *Payton v. New York*, 445 U.S. 573 (1980). There officers had substantial probable cause to arrest, and sought to effectuate those arrests inside of the homes of the defendants. The Court ruled that, absent exigency, the Fourth Amendment required the approval of a magistrate before police breach the entrance of a person's home. *Id.* at 589. *Cf. Arizona v. Hicks*, 480 U.S. 321 (1987)(lawful police entry of a home due to exigency does not authorize search of an object that lacks probable cause to be associated with criminal conduct). Finally, although the search in *Ybarra v. Illinois*, 444 U.S. 85 (1979), occurred at a public tavern, the lesson it teaches -- namely, the possession of a search warrant does not excuse officers from complying with other Fourth Amendment restraints when executing that warrant is, *a fortiori*, applicable to searches in the home. In *Ybarra*, while executing a search warrant for narcotics of a tavern and its bartender, officers also frisked patrons of the bar. The Court ruled that the warrant itself provided no authority to frisk the patrons at the officers' discretion. Those searches were valid only if the police had individualized, reasonable suspicion that the persons searched were armed and presently dangerous. *Id.* at 91-94.

restrain discretionary intrusions, the court below insists that "the officers executing a search warrant are in the best position to decide how to take command of [a] situation," and thus it is "constitutionally reasonable to allow officers in the field to decide what course of action to pursue instead of requiring them to 'take unnecessary risks.'" 549 N.W.2d at 225 (citations omitted). The flaw in this judgment is not the conclusion that officers in the field are in the best position to gauge the surroundings involved with entering private premises. We agree that officers have the initial responsibility for deciding how to proceed when executing a search warrant. The court below, however, erred in concluding that officers in the field must have both the first and final word on whether an unannounced entry should have occurred in a particular case. As this Court explained in *United States v. U.S. District Court*, 407 U.S. 297, 317 (1972), when confronted with a similar claim of law enforcement privilege:

> [T]hose charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy . . . ."

All of the above cases illustrate a legal norm overlooked by the Wisconsin Supreme Court. Law enforcement officials should not be relied upon to determine whether Fourth Amendment safeguards have been properly observed during a police invasion of a home. A police entry into a home, even an entry authorized by a warrant or a recognized exception to the warrant rule, must still pass constitutional muster under the Reasonableness Clause. To say that

police officers can never be the sole judges of whether the notice rule has been properly applied will not mean that notice must always been given. But it is a radical step to permanently exclude police entries of a home from judicial scrutiny and from the command of the Reasonableness Clause.

Concededly, the holding in *Michigan v. Summers*, 452 U.S. 692 (1981), grants officers "automatic" authority to detain occupants of a home while executing a warrant to search for contraband.[33] But the detention allowed in *Summers* was "an incremental intrusion on personal liberty," *id.* at 703, whereas even critics of the notice rule concede that unannounced entries *do* jeopardize significant privacy interests.[34] More importantly, this Court subsequently explained that the detention in *Summers* was justified because "the search warrant implied a judicial determination that police had *probable cause* to believe that someone in the home was committing a crime." *Buie*, 494 U.S. at 334 n.2 (emphasis added). But a search warrant for felonious narcotics implies nothing about the authority of the police to make an unannounced entry. That is the point of *Wilson*, where the Court concluded that, standing alone, the warrants to search and arrest Sharlene Wilson in her home implied nothing about the authority of the police to make an unannounced entry.

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[33] *Summers* held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705 (footnotes omitted).

[34] Michael R. Sonnenreich & Stanley Ebner, "No-Knock and Nonsense, An Alleged Constitutional Problem," 44 St. John's L.Rev. 626, 647 (1970).

IV. EXCEPTIONS TO FOURTH AMENDMENT REQUIREMENTS DUE TO EXIGENT CIRCUMSTANCES, WHETHER THEY CONCERN POLICE SAFETY OR THE DESTRUCTION OF EVIDENCE, TURN ON A CASE-SPECIFIC EVALUATION OF THE FACTS

The Court's Fourth Amendment rulings have been sensitive to the needs of law enforcement, particularly to the concern of police safety. When police safety is at stake, the Court has shown acute awareness of the practical realities that confront officers in their interactions with criminal suspects. As in other Fourth Amendment contexts, the Court's cases balance the rights of individuals against the interests of society in effective law enforcement and in not creating undue risks for officers in the field. Thus, where exigent circumstances exist, whether concerning the destruction of evidence, *see Schmerber v. California*, 384 U.S 757, 771 (1966), or threats to police safety, *see Terry v. Ohio*, 392 U.S. 1 (1968), officers are often excused from compliance with traditional Fourth Amendment requirements. The state, however, "bear[s] a heavy burden when attempting to demonstrate an urgent need that might justify" an exception to traditional Fourth Amendment requirements. *See Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984).

A. Categorical Rules Are Rarely Used To Judge The Reasonableness Of Discretionary Police Conduct, Even In Contexts That Raise Legitimate Concerns About Police Safety

The blanket rule created below rests primarily on the court's concern about police safety.[35] While police safety

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[35] While the death of even a single officer is one death too many, the (continued...)

is a state interest that often is an element of the reasonableness inquiry, there is sparse precedent for a judgment that entirely eliminates judicial review of discretionary police conduct that implicates Fourth Amendment interests. The Court's classic statement on the balancing required where officer safety is weighed against Fourth Amendment interests is *Terry v. Ohio*, 392 U.S. 1.

Terry posed a confrontation between the interest of every person to be free of police inquiry as he or she walks the streets, and the authority of a police officer to frisk for weapons "to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Id.* at 23. Like the reactions of officers who must decide on how entry into private premises will be managed, *Terry* recognized that a frisk involves police conduct that is "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat." *Id.* at 20. Despite the risks inherent in any given police-citizen encounter, *Terry* did not adopt a rigid rule permitting frisks in all street confrontations. A frisk is permissible only where a reasonable and articulable suspicion exist that a suspect is armed and presently dangerous. *Id.* at 30.

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[35] (...continued)
statistics cited below concerning the death of officers by firearms are over ten years old. *See* 549 N.W.2d at 224 n.9. Moreover, none of the statistics cited indicate whether those officers killed were executing search warrants for narcotics in a private home. A more recent study by the Federal Bureau of Investigation analyzed deaths of officers in 1994. That report notes that 76 officers were killed in 1994. *See* Uniform Criminal Reports, "Law Enforcement Officers Killed and Assaulted Publication 1994" at 3 (Federal Bureau of Investigation 1996). Of the 76 officers killed in 1994, only three officers were killed in arrests for drug related matters. *Id.* at 43, 44 & 47. One of those deaths involved an officer attempting an entry into a private residence to make an arrest. *Id.* at 44.

This Court has consistently employed *Terry*'s contextual approach when weighing Fourth Amendment rights against the state's legitimate interest in protecting officers against threats to their safety.[36] For example, in *Maryland v. Buie*, 494 U.S. 325, *Terry*'s balancing formula was utilized to determine when a protective sweep of a home was permissible when executing an arrest warrant for a violent felon. Maryland argued that a protective sweep, designed to ensure the safety of officers, was permitted whenever officers make an in-home arrest for a violent crime. Without disputing the state's concern that the "risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter," 494 U.S. at 333, *Buie* turned down the state's submission that no level of objective justification is required for a protective sweep "because of 'the danger that inheres in the in-home arrest for a violent crime.'"[37]

Following the reasoning of *Terry*, *Buie* ruled that a protective sweep is lawful if "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to

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[36] *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983)(recognizing that roadside encounters pose risks to investigating officers, *Terry*'s rationale permits a search of the passenger compartment of a car for weapons where there is reasonable grounds that a motorist is dangerous and may gain access to weapons); *Adams v. Williams*, 407 U.S. 143 (1972)(frisk permitted where officer reasonably believed that suspect in car was a threat to officer's safety).

[37] *Id.* at 334 n.2. Much like the argument relied on below, Maryland contended that every in-home arrest poses an inherent exigency for the arresting officers: "The State argues that '[o]fficers facing the life threatening situation of arresting a violent criminal in the home should not be forced to pause and ponder the legal subtleties associated with a quantum of proof analysis." *Id.* This argument was rejected.

those on the arrest scene." 494 U.S. at 334. In contrast to the decision below, *Buie* declared that the intrusion it authorized was "decidedly not 'automati[c],'" *id.* at 336, and would ultimately turn on the specific facts of each case. *See id.* at 334 n.2 ("Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted. That approach is applied to the protective sweep of a house").

Another notable instance where the Fourth Amendment's applicability to an investigatory encounter did not depend on an "all-or-nothing" resolution was *Tennessee v. Garner*, 471 U.S. 1 (1985). The issue was whether an officer could use deadly force to arrest an apparently unarmed fleeing felon. State officials argued that the imposition of constitutional rules in this context would "require[] the police to make impossible, split-second evaluations of unknowable facts." *Id.* at 20. While not "deny[ing] the practical difficulties of attempting to assess the suspect's dangerousness," *id.* at 20, *Garner* unequivocally rejected the claim that the Fourth Amendment had nothing to say about *how* an arrest is executed. The reasonableness requirement did control how officers would effectuate an arrest, and objective standards would dictate when deadly force could be used. Thus, probable cause to arrest did not authorize the use of deadly force unless a suspect "poses a threat of serious physical harm, either to the officers or to others." *Id.* at 11. Applying this criteria to the specific facts in *Garner*, the Court concluded that the use of deadly force was unreasonable. *Id.* at 20-21.[38]

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[38] The holding in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(*per curiam*), is not pertinent to this case. *Mimms* gave officers discretion to order a driver out of a car during a lawful traffic stop. *Mimms* found

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Wisconsin's legitimate interest in allowing officers executing a search warrant for narcotics to take reasonable steps to neutralize a threat of peril can be accommodated within the reasonableness inquiry developed by this Court's precedents. These precedents dictate that an unannounced entry is permissible only where officers have reasonable grounds, based on the specific facts of the case, to believe that knocking and announcing their presence would threaten the safety of the officers or third parties.[39] Rather than follow

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[38] (...continued)
that the state's interest in officer safety justified the order to exit the vehicle, which the Court saw as a *de minimis* intrusion, hardly rising to the "'level of a petty indignity.'" *Id.* at 111 (citation omitted). The interest in announcement before a forcible police entry carries greater constitutional significance compared to the minimal interest in *Mimms*. Besides, the blanket rule approved in *Mimms* involved an automobile which has never been afforded the same degree of constitutional privacy given to a private dwelling. As then-Justice Rehnquist remarked in *Rakas v. Illinois*, 439 U.S. 128, 148 (1978): "We have on numerous occasions pointed out that cars are not to be treated identically with houses or apartments for Fourth Amendment purposes."

[39] We believe the Court's cases embrace the probable cause standard as the applicable standard for establishing exigent circumstances to justify suspension of the announcement. *See, e.g., McDonald v. United States*, 335 U.S. 451, 454-55 (1948); *Johnson v. United States*, 333 U.S. 10, 15 (1948); *United States v. Santana*, 427 U.S. 38, 42 (1976)(noting that in *Warden v. Hayden*, 387 U.S. 294 (1967), the Court "recognized the right of police, who had *probable cause* to believe that an armed robber had entered a house a few minutes before," to make a warrantless entry)(emphasis added); *Minnesota v. Olson*, 495 U.S. 91, 100 (1990)(agreeing with the state court's "fact-specific" application of the exigent circumstances test, after state court concluded "there must be at least *probable cause* to believe" that certain factors were present in the case)(emphasis added); *Welsh v. Wisconsin*, 466 U.S. at 759 (White, J., dissenting)("[I]f, under all the circumstances of a particular case, an officer has *probable cause* to believe that the delay involved in procuring an arrest warrant will gravely endanger the officer or other persons or will result in the
(continued...)

these precedents, the lower court assumed that every search warrant for narcotics creates its own exigency.[40] This assumption is inconsistent with another basis norm of this Court's Fourth Amendment cases: the seriousness of a crime does not create its own exigency to justify deviation from Fourth Amendment requirements. *Mincey*, 437 U.S. at 394.[41] Just as an arrest of a violent felon does not create

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[39] (...continued)
suspect's escape," a warrantless entry should not depend on the nature of the offense)(emphasis added). We also recognize, however, that where police-citizen confrontations raise legitimate concerns of police safety and the challenged intrusion does not rise to the level of a full scale search or arrest, the Court has utilized the reasonable suspicion standard articulated in *Terry*. *See* p.22, *supra*. We submit that the circumstances of an unannounced, forcible entry merit the Court's most stringent standards, rather than the lesser standards imposed under *Terry* and its progeny. At a minimum, exigency in this context must be measured by the specific facts confronting officers in a particular case. Any other result defies the "central teaching of this Court's Fourth Amendment jurisprudence" -- which is -- "a demand for specificity in the information upon which police action is predicated." *Terry*, 392 U.S. at 21 n.18.

[40] *See* 549 N.W.2d at 222 n.6 (rejecting the state's submission that the police need reasonable suspicion prior to an unannounced entry. "Our holding is based on the assumption that drug dealers will have weapons and pose a danger to officers, and that drug dealers will destroy evidence or at least attempt to destroy evidence after announcement by the police").

[41] *See also Minnesota v. Olson*, 495 U.S. 91 (affirming judgment where the state court found lack of exigency justifying a warrantless entry into a home to arrest suspect in murder-robbery crime); *Payton v. New York*, 445 U.S. 573 (warrantless entry to conduct routine arrest of defendants, a murder suspect and an armed robbery suspect, violated Fourth Amendment); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970)("We decline to hold that an arrest on the street can provide its own 'exigent circumstance' so as to justify a warrantless search of the house"); *cf. U.S. District*, 407 U.S. 297 (acknowledging the importance and sensitive nature of domes-
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its own exigency, it should not be assumed that a search warrant for narcotics always creates exigent circumstances. A contrary result flies in the face of *Wilson*, which held that, despite the issuance of arrest and search warrants for a defendant who had earlier threatened a police informant, the specific entry to execute those warrants was subject to a reasonableness inquiry, and that state courts were required to make initial "findings of fact and to make the determination of reasonableness in the first instance" before an unannounced entry could be declared constitutionally valid. *Wilson*, 115 S.Ct. at 1919.

B. Whether The Destruction Of Evidence Exception Exists To Justify Lack Of Notice Is Decided On A Case-By-Case Basis

In several cases, this Court has addressed claims that an exigency justified departure from traditional Fourth Amendment safeguards in order to preserve evidence of a crime, or to apprehend a suspect. In each case, the government's

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[41] (...continued)
tic security issues, but concluding that the President's authority in this area "must be exercised in a manner compatible with the Fourth Amendment").

The dicta in *Washington v. Chrisman*, 455 U.S. 1 (1982), does not alter this rule. The issue in *Chrisman* was whether an officer may accompany an arrested person into his residence and seize contraband discovered in plain view. The Court held that "it is not 'unreasonable' . . . for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest." *Id.* at 7. In reaching this holding, the Court remarked that "[e]very arrest must be presumed to present a risk of danger to the arresting officer." *Id.* This dicta concerned the interest of an officer in maintaining "custodial authority" over an arrestee, and was not meant as a license to free arresting officers from other Fourth Amendment restrictions that control the arrest context.

claim of exigency was evaluated on the particular facts of the case. Starting with *Johnson v. United States*, 333 U.S. at 15, the Court scrutinized the particular facts of that case to assess whether, after the police had detected the odor of burning opium, a warrantless entry into the defendant's hotel room was justified by exceptional circumstances. One year later, in *McDonald v. United States*, 335 U.S. 451, the Court explained that, when the government seeks exemption from constitutional norms designed to protect the privacy of the home, it must prove "that the exigencies of the situation made that course imperative." *Id.* at 456. In *McDonald*, the facts revealed no fleeing defendant, nor was there an indication that crucial evidence of a crime was "in the process of destruction nor as likely to be destroyed as the opium paraphernalia in the *Johnson*." *Id.* at 455.[42]

Later, in *Schmerber v. California*, 384 U.S. at 771, the Court concluded that "[g]iven the special facts" of that case, the warrantless removal of blood from a drunk-driving suspect in a hospital setting was permissible.[43] In *Warden v. Hayden*, a warrantless entry of a home was upheld because, "[u]nder the circumstances of this case, 'the exigencies of the situation made that course imperative.'" 387 U.S. at 298

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[42] The concurring and dissenting opinions in *McDonald* agreed with the majority's conclusion that exigency for a warrantless entry is judged by the particular facts of the case. Thus, Justice Jackson stated: "Even if one were to concluded that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case." *Id.* at 459 (Jackson, J., concurring). And Justice Burton's dissent explained: "Under the circumstances, a prompt entry by the police was justified when they reasonably suspected that the crime of numbers lottery was being committed at that moment." *Id.* at 462 (Burton, J., dissenting).

[43] At the end of its opinion, *Schmerber* noted that "[i]t bears repeating . . . that we reach th[e] judgment [that the Fourth Amendment was not violated] only on the facts of the present case." *Id.* at 772.

(citation omitted). Finally, in *Vale v. Louisiana*, 399 U.S. 30, the Louisiana Supreme Court validated a warrantless entry and search of Vale's home after officers had observed Vale emerge from his home and consummate a drug transaction with another person in front of the house. The Louisiana court found "the search independently supportable because it involved narcotics, which are easily removed, hidden, or destroyed." *Id.* at 34. After reiterating that "the burden rests on the State to show the existence of [] an exceptional situation," *id.*, *Vale* concluded that the "record before us" provided no exigency to justify the warrantless search. *Id.* Concerning the need for an immediate intrusion due to the possible destruction of evidence, *Vale* noted that "[t]he goods ultimately seized were not in the process of destruction." *Id.* at 35. Although Justice Black's dissent disputed the Court's conclusion that it was necessary to show that evidence was "in the process of destruction," Justice Black agreed with the majority's conclusion that exigency turns on the particular facts of the case. *Id.* at 36.

In sum, the Court's cases uniformly require that the destruction of evidence exception be judged by scrutinizing the totality of the facts in a particular case. The judgment below ignores this mandate and would suspend an important Fourth Amendment norm on the belief that "the announcement rule [is] no longer valid in today's drug culture." 549 N.W.2d at 221. Of course, Fourth Amendment interests do not depend on the ebb and flow of the government's success in its war on drugs. The rights protected by that provision, while not absolute, are constant.

CONCLUSION

For the reasons stated above, the judgment of the Wisconsin Supreme Court should be reversed.

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